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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARTHUR T. JOHNSON, Plaintiff/Appellant, v. PINAL COUNTY, a political subdivision; PINAL COUNTY CLERK OF THE SUPERIOR COURT; PINAL COUNTY SUPERIOR COURT, Defendants/Appellees.	2 CA-CV 2009-0148 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
PINAL COUNTY, a political subdivision, Defendant/Cross-Appellant, v. ARTHUR T. JOHNSON, Plaintiff/Cross-Appellee.	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200900267

Honorable A. Craig Blakey II, Judge

AFFIRMED

Arthur T. Johnson — Coolidge
In Propria Persona

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Cross-Appellant Pinal County

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K E L L Y, Judge.

¶1 Appellant/cross-appellee Arthur Johnson appeals the trial court's grant of summary judgment in favor of appellees the Pinal County Superior Court and its Clerk and Pinal County. Pinal County cross-appeals the trial court's denial of its request for sanctions against Johnson. We affirm the trial court's grant of summary judgment as to all parties and its denial of Pinal County's request for sanctions in the trial court. We grant Pinal County's request for attorney fees and costs on appeal.

Background

¶2 On appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered. *Gipson v. Kasey*, 214 Ariz. 141, ¶ 2, 150 P.3d 228, 229 (2007). In December 2008, Johnson filed an objection to a writ of garnishment of a bank account and requested a hearing. The hearing was held seven business days after Johnson filed his objection. The trial court ruled in Johnson's favor and quashed the writ of garnishment.

¶3 Johnson then filed a complaint alleging the Pinal County Superior Court had mishandled his objection and had failed to commence a hearing within five business days as required by A.R.S. § 12-1580. Johnson named Pinal County, the Pinal County Superior Court, and the Clerk of the Pinal County Superior Court as defendants and requested "not less than One Million Dollars" in punitive damages from the Pinal County Superior Court. Shortly thereafter, in February 2009, Pinal County notified Johnson by letter that because he had not filed a notice of claim and had not alleged any legally recognizable claim against Pinal County, it would move for sanctions if he refused to voluntarily dismiss his complaint.

¶4 When Johnson failed to voluntarily dismiss the complaint, Pinal County ("the County") moved to dismiss it because Johnson had not filed a notice of claim and because the County could not be liable for the alleged omissions of the Pinal County Superior Court and its Clerk ("Court Defendants"), as it had no right to control the actions of State of Arizona officials. The Court Defendants also moved to dismiss the complaint on the grounds that Johnson had not served the proper defendant, which was the State of Arizona; Johnson had not filed a notice of claim with the Court Defendants before filing suit against them, as required by A.R.S. § 12-821.01(A); and Johnson's claims against the Court Defendants were barred by the doctrine of judicial immunity.

¶5 The trial court granted both motions to dismiss, treating them as motions for summary judgment. It dismissed the County because Johnson had not filed a notice of claim with the County before filing suit, and had failed to establish how the County was liable for the alleged omissions of the Court Defendants. It dismissed the Court

Defendants because Johnson had not filed a notice of claim with the State of Arizona. The court also found that the Pinal County Superior Court was not a jural entity subject to suit, and that judicial immunity applied to the Court Defendants. In the same ruling, the court denied the County's motion for sanctions.

¶6 Johnson has appealed the trial court's grant of summary judgment. Pinal County has filed a cross-appeal from the trial court's denial of its motion for sanctions. Although Johnson filed his notice of appeal before the trial court entered final judgment, this court has jurisdiction over Johnson's appeal and Pinal County's cross-appeal pursuant to A.R.S. § 12-2101(B). *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981) (notice of appeal may be filed after trial court has made final decision, but before formal judgment entered, if only remaining task is merely ministerial and no party suffers prejudice).

Discussion

¶7 We review a grant of summary judgment de novo and view the facts in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment is appropriate when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). The determination of whether a genuine issue of material fact exists is based on the record made in the trial court. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994).

¶8 Johnson argues the trial court erred in granting summary judgment and dismissing the defendants. In its ruling, the court found that because Johnson had never

filed a notice of claim with the County, the Court Defendants, or the State of Arizona, as required by § 12-821.01(A), his claims against each of the defendants were barred. Section 12-821.01(A) requires a person who has a claim against a public entity to file the claim with the person authorized to accept service for that entity "within one hundred eighty days after the cause of action accrues." Any claim not filed within that time "is barred and no action may be maintained thereon." *Id.* "The purpose of this statute is to give an agency notice of a claim, an opportunity to assess the claim and the potential for liability, and a chance to settle the claim before an action is filed in court." *Barth v. Cochise County*, 213 Ariz. 59, ¶ 9 138 P.3d 1186, 1189 (App. 2006).

¶9 Johnson's opening brief does not address his failure to serve the defendants with a notice of claim and we deem this issue conceded. *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, ¶ 17, 91 P.3d 1019, 1023 (App. 2004) ("Generally, we will consider an issue not raised in an appellant's opening brief as abandoned or conceded."). And nothing in the record before us establishes that Johnson filed a notice of claim with either the County or the State of Arizona. Because Johnson failed to comply with the requirements of § 12-821.01, his claims were barred, and the trial court properly granted summary judgment in favor of the County and the Court Defendants.

¶10 Because the trial court properly granted the motion for summary judgment in light of Johnson's failure to comply with § 12-821.01, we need not decide whether the County is liable for the acts of judicial officers and clerks employed by the Pinal County Superior Court. Nor do we address the Court Defendants' alternative arguments that

judicial officers and court clerks are immune from civil actions for their judicial acts, or that the Pinal County Superior Court is not a jural entity subject to suit.

Cross-Appeal

Trial Court's Denial of Sanctions

¶11 In its cross-appeal, the County contends the trial court erred by denying its request for sanctions against Johnson pursuant to A.R.S. § 12-349, which requires trial courts to enter sanctions against parties who file frivolous lawsuits. The County requested an award of attorney fees under § 12-349(A)(3), which requires it to establish by a preponderance of the evidence that Johnson had "unreasonably expand[ed] or delay[ed] the proceeding."

¶12 We view the evidence "in a manner most favorable to sustaining" the trial court's judgment. *Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 382, 762 P.2d 1334, 1336 (App. 1988). We will not disturb the trial court's findings of fact unless they are clearly erroneous but we review de novo the court's application of the statute. *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997).

¶13 Although the trial court agreed with the County that it was not a proper party defendant, it denied the County's motion for sanctions, explaining that because Johnson "in good faith believed that his case ha[d] merit, particularly after his frustrated attempts to have his objection to the writ of garnishment heard, it [was] understandable that he was leery in accepting opposing counsel's explanations regarding who is or is not a proper Defendant." Viewing the evidence in the manner most favorable to upholding the trial court's judgment, we conclude the evidence supported the trial court's

determination that Johnson had not acted unreasonably in refusing to voluntarily dismiss his claims against the County. We therefore uphold the trial court's denial of sanctions.

Fees on Appeal

¶14 The County requested we "remand the case to the trial court for it to award [the] County its reasonable attorney's fees and expenses . . . through the date of the trial court's award," a period which presumably would have included this appeal. In awarding attorney fees pursuant to § 12-349, two of the factors we may consider are "[t]he extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid," and "[t]he availability of facts to assist a party in determining the validity of a claim or defense." A.R.S. § 12-350(2), (3). Consideration of these factors supports an award of fees on appeal in this case, which we grant in our discretion, even though the County's request was not explicit.

¶15 The trial court's conclusion that Johnson may have been "leery in accepting opposing counsel's explanations regarding who is or is not a proper Defendant" was a sufficient basis for its finding that Johnson had a good faith basis for refusing to dismiss his claims against the County in the trial court. But, even after the court ruled, consistent with the County's counsel's explanation, that Johnson's claims against the County were barred and therefore invalid, Johnson refused to abandon his claims against the County and named it as a party to this appeal. Then, having named the County, Johnson did not address in his opening brief his failure to file a notice of claim with the County nor did he state a legal basis for his claim that the County is liable for alleged omissions of the Court

Defendants. We therefore conclude that Johnson "unreasonably expanded the proceedings in this action" with respect to the County. § 12-349(A)(3). Thus, we grant the County's request for attorney fees on appeal upon its compliance with Rule 21, Ariz. R. Civ. App. P. *See Larkin v. State ex rel. Rottas*, 175 Ariz. 417, 431, 857 P.2d 1271, 1285 (App. 1992).

Disposition

¶16 The trial court's judgment is affirmed, and the County is awarded its reasonable fees, expenses, and costs upon compliance with Rule 21.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge